

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**BELFAST & MOOSEHEAD  
RAILROAD, et al.,**

**Plaintiffs**

**v.**

**PETER DUFOUR, et al.,**

**Defendants**

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Civil No. 90-0114 P**

**ORDER ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER  
PURSUANT TO F.R.Civ.P. 26(c)**

In this lawsuit challenging the constitutionality of the Maine Railroad Personnel Act ("Act"), 32 M.R.S.A. §§ 4140-50, the defendants seek a protective order pursuant to Fed. R. Civ. P. 26(c) to prevent the plaintiff railroads<sup>2</sup> from deposing the defendant Board on six questions. The plaintiffs express willingness to assent to the protective order on condition that the defendants be deemed to have waived their right to present a factual case. For the reasons enumerated below, I **GRANT** the protective order unconditionally as to four of the questions and conditionally as to two. In so doing, I decline the plaintiffs' invitation to declare a waiver of the defendants' right to present a factual case.

---

<sup>1</sup> The defendants are James E. Tierney, attorney general of the state of Maine, and members of the Maine Board of Licensure of Railroad Personnel ("Board"): Peter Dufour, Albert Bowen, Ernest Phillips, David Kruschwitz, William Mayo, James McGowan and Stanley Yates. Since the notice of deposition was filed on July 2, 1990, Yates' term as a board member has expired. George Jackson has been named his replacement.

<sup>2</sup> The plaintiff railroads are Belfast & Moosehead Railroad, Bangor & Aroostook Railroad, Boston & Maine Railroad, Canadian Pacific Limited, Maine Coast Railroad, New Hampshire Northcoast Corporation, Springfield Terminal Railway, St. Lawrence & Atlantic Railway and Maine Central Railroad.

Under Fed. R. Civ. P. 26(c), a court may limit discovery ``for good cause shown." The defendants show good cause to bar deposition on questions numbered 1, 2, 3 and 6. I am also persuaded to suspend deposition on questions numbered 4 and 5 unless and until the defendants decide to testify as to facts not in the plaintiffs' possession.

Questions 1, 2 and 3 bear on the history of the Act and the rules promulgated pursuant to it. Specifically, the plaintiffs seek to ask the Board for information on

1. The reasons and justification for enacting the Maine Railroad Personnel Act, 32 M.R.S.A. ' 4140, *et seq.*;

2. The reason and justification for adopting Rules pursuant to the Maine Railroad Personnel Act by the Maine Board of Licensure of Railroad Personnel;

3. The factual underpinnings for the reasons or the justifications for enacting the Railroad Personnel Act and promulgation of Rules pursuant to same.

Notice of Deposition attached to Defendants' Memorandum in Support of its Motion for Protective Order Pursuant to Fed. R. Civ. P. 26(c) ("Defendants' Memorandum") at 1-2. The defendants correctly observe that these requests, in effect, would require the Board to manufacture legislative and administrative history.<sup>3</sup> This court would violate a cardinal rule of statutory construction were it to accord any significant weight to such after-the-fact pronouncements. Comments by Board members would not even merit the slight deference given post-enactment remarks by hands-on legislators and rulemakers. *See, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 116-20 (1980); *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 59-60 (1st Cir. 1990). I therefore have no difficulty in sparing the Board the expense of engaging in this exercise in futility.

---

<sup>3</sup> The inquiry into ``factual underpinnings" strikes me as an impermissible attempt to peer behind the curtain of legitimate legislative and administrative history. Those who drafted the statute and the rules should have alluded to any salient ``factual underpinnings" in contemporaneous accounts of

In question 6, the plaintiffs inquire as to "[t]he Board's and any other state agencies' plans to enforce the Act and the regulations promulgated thereunder." Notice of Deposition at 2. The defendants explain that, as a practical matter, any criminal prosecution under the act would be brought by the attorney general rather than by the Board. Attorney General's letter attached to Defendants' Memorandum at 3. The attorney general's records, in turn, are decreed confidential by 5 M.R.S.A. ' 200-D which provides:

Notwithstanding any other provision of law, all complaints and investigative records of the Department of the Attorney General shall be and are declared to be confidential.

The Maine legislature enacted the above statute "to facilitate future criminal investigations by the Attorney General," among other reasons. *Dunn & Theobald, Inc. v. Cohen*, 402 A.2d 603, 605 (Me. 1979). The plaintiffs do not specifically seek "complaints and investigative records"; however, it is difficult to see how the state could answer an inquiry as to its plans without disclosing the substance of records and putting violators on notice of impending prosecution. Accordingly, the plaintiffs may not depose the Board as to the state's enforcement plans.

The plaintiffs seek in question 4 to uncover

[t]he legal and factual predicates upon which the Board bases its defense that the Railroad Personnel Act and the Rules promulgated thereunder are not preempted by federal law and the United States Constitution, and are not unconstitutional under the Commerce Clause of the United States Constitution.

Notice of Deposition at 2. The plaintiffs' inquiry as to the legal predicates of the Board's defenses runs afoul of the work-product doctrine. The defendants aver that counsel for the state possess knowledge of the Board's legal defenses. To answer the question, the Board would have to ask counsel to divulge  

---

their actions.

materials prepared in anticipation of litigation. Under Fed. R. Civ. P. 26(b)(3), a party may obtain such materials only upon a showing of substantial need and undue hardship in obtaining the equivalent information elsewhere. No such showing has been made by the plaintiffs in the instant case.

Ordinarily, the plaintiffs would be entitled to discover the "factual predicates" of the Board's defenses. The defendants demonstrate, however, that such an inquiry is not reasonably calculated to lead to admissible evidence in the case as it now stands. The defendants insist that their defenses are legal in nature "at this juncture," Defendants' Memorandum at 5, and that they will call no Board member to testify as to any facts.<sup>4</sup>

In a similar vein, the plaintiffs seek in question 5 to glean "[t]he factual underpinnings for any claims that the Maine Railroad Personnel Act and the rules promulgated thereunder are necessary to preserve or enhance the health, safety, and welfare of the peoples of Maine." Notice of Deposition at 2. The defendants reiterate that their defenses are legal in nature; for example, they would rely on legislative and administrative history to answer question 5. This question therefore is not calculated to lead to the discovery of admissible evidence.

Accordingly, I suspend deposition on question 5 and the "factual predicate" portion of question 4 unless and until such time as the defendants decide to testify to facts not in possession of the plaintiff railroads. In that event, the defendants must notify the plaintiffs of their changed plans and afford the plaintiffs the right to depose the Board on questions 4 and 5. At that time, the plaintiffs

---

<sup>4</sup> The defendants contend that the railroads are in possession of any disputed facts in this case and that, should the state call witnesses, they will be railroad employees. The state would notify the plaintiffs who it intended to call.

also will have the right to press interrogatories that the defendants have refused to answer on grounds that their defense is legal, rather than factual, in nature.

For the foregoing reasons, I hereby **GRANT** the defendants' motion for a protective order pursuant to Fed. R. Civ. P. 26(c), subject to the conditions outlined above.

***Dated at Portland, Maine this 24th day of October, 1990.***

---

***David M. Cohen***  
***United States Magistrate***